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EXAMINER

MADSEN, ROBERT A

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Application Number: 09/728,697
Filing Date: December 01, 2000
Appellant(s): STAGG ET AL.

Timothy A. Czaja
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed January 19, 2005 appealing from the Office action mailed September 22, 2004.

Art Unit: 1761

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

Art Unit: 1761

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

4,773,541	Riddell	9-1998
4,397,703	Osborn	8-1983
5,203,634	Kim	4-1993
3,179,326	Underwood et al.	4-1965
5,080,957	Leseman et al.	1-1992
6,316,036 B1	Hodson et al.	11-2001
5,885,630	Zurawski et al.	3-1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1,2,4,5,11,13, 17,18,20,21,27,29,35,36, 37, 38,41,42,44,45,47, 51,52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Riddell (US 4773541) in view of Osborn (US 4397703).

Regarding claims 1,2,4,5,11,13, 17,18,20,21,27 29,35,36, 37, 38,41,42,44,45,47, 51,52 Riddell teaches a package and a method of packaging a product with a tear

Art Unit: 1761

resistant film that does not normally tear in clean manner, such as polyethylene and oriented polypropylene, and a filament reinforced tearable tape (i.e. item 8) that is at least 8 mm in length (i.e. ½ in wide) with tearable center section, a non-tearing longitudinal edges and a tab that provides a clean tear edge, wherein the film does not include a weakened section by the tab, and the package includes a base holding at least one article with the film conforming to the shape of the base (See Abstract, Column 1, line 19 to Column 2, line 25, Column 3, line 4 to Column 4, line 9, Figures). Riddell further teaches the film must a tear strength that is sufficiently low for opening yet provide a sufficient shipping and display stiffness and durability (Column 2, lines 6-17), but is silent in teaching a puncture-propagation tear (PPT) of at least be 20 N/ply as recited in claims 1, 17, and 38.

Osborn is relied on as evidence of the conventionality of polyethylene films used for commercial bags used in shipping (Column 1, lines 1-25). The Osborn teaches conventional polyethylene film based packages, made of 6 mil LDPE and 9 mil LDPE, that are used for shipping products have a PPT of 48.9 N/ply and 97.9 N/ply (i.e. 11 and 22 lbf), respectively (Columns 19 and 20, Example 7 and Table 2). Therefore it would have been obvious to select a polyethylene film of at least 20 N/ply since Riddell teaches the film must be durable and strong enough for shipping and Osborn teaches the conventional commercial polyethylene film package (i.e. commercial bags) that is durable strong enough for shipping has a PPT value of at least 20 N/ply. Thus, one would have been substituting one type of polyethylene film for another for the same purpose: mercantile packaging that is durable and suitable for shipping.

Claims 8,14,15,16,24, 31,32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Riddell (US 4773541) in view of Osborn (US 4397703).as applied to claims 1,2,4,5,11,13, 17,18,20,21,27,29,35,36, 37, 38,41,42,44,45,47, 51,52 above, further in view of Kim (US 5203634).

Regarding claims 8,14,15,16,24, 31,32, Riddell teaches a tearable tape applied to the exterior surface of the film and a strip applied to the interior of the film to initiate tearing. The tearable tape has a central section that tears away such that guides on either side of the central section remain(Column 3, lines 19-35). However, Riddell is silent in teaching a tearable strip that is internally tearable mounted on *both* the exterior and interior of the film or a cover tape on the surface of the film opposite the tearable strip. Kim '634 teaches that applying one strip to the interior of the film and a tape to the exterior of the film, like that which is taught by Riddell, results in manufacturing problems. Kim '634 teaches the problems are overcome by applying an internally tearable portion with guides on both the interior and exterior (i.e. a cover tape)of a given container wall (Column 1, line 17 to column 2, line 53). Therefore, it would have been obvious to include an internally tearable tape strip with guide portions on both the exterior and interior of the film surface (i.e. thus providing a cover tape) since it improves the manufacturing process and one would have been substituting one type of internally tearable tape strip design for another for the same purpose.

Art Unit: 1761

Claims 1,2,4-8,11,13,14, 17,18,20,21-24, 27, 29,30,33,35-39, 41,42,44- 48,51,52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Underwood et al. (US 3179326) in view of Osborn (US 4397703) and Leseman et al. (US 5080957).

Regarding claims 1,2,5,8, 13,14, 17,18,21,24, 29,30,35-39, 41,42,45,47,48,51,52, Underwood et al. teach commercial gum or cigarettes packages wrapped in cellophane are cleanly tearable with conventional tearable tapes, but these wrappers, which are notoriously well known to conform to the shape of an article as recited in claims 35-37,41,51, were not replaceable by tear resistant polyethylene, or specifically LDPE film-based wrappers, because LDPE films were not cleanly tearable using conventional tearable tapes. To solve the problem of opening the enclosed region formed by a LDPE-based film in commercial packages, as recited in claims 5,21, 45, and thus substituting LDPE based films for cellophane, Underwood et al. teach applying a single tearable tape, as recited in claims 14,30, of uniaxially oriented polypropylene, or a tensilized PP, either above or below the surface of a LDPE film as recited in claims 8,24,47,48 that includes a central portion with a tab and two longitudinal portions on either side of the central portion that remain attached to the surface of the LDPE film in order to guide the central portion to cleanly remove the underlying unweakened portion of LDPE, as recited in claims 1,13, 17,29,38,52 in the normally non cleanly tearable LDPE film as recited in claims 2, 18,42 (Column 1, lines 10-37 and 45-70, Column 3 line 69 to Column 4, line 21, Column 6, lines 46-52, Column 7, line 50 to Column 8, line 51, and Figures 2,3,5). However, Underwood et al. are silent in teaching the particular puncture-propagation tear resistance (PPT of at least 20

Art Unit: 1761

N/ply) of LDPE films used in commercial packaging that would desirably replace cellophane, and the particular type of tear tape such as reinforced strapping or filament reinforced tapes as recited in claims 1,17, and 38.

Osborn is relied on as evidence of the conventional LDPE films used in mercantile packages (i.e. commercial bags, Column 1, lines 1-25). Osborn teaches conventional polyethylene film used for commercial packages have a PPT of 48.9 N/ply or 97.9 N/ply (i.e. 11 and 22 lbf), depending on their thickness (Columns 19 and 20, Example 7 and Table 2). Therefore it would have been obvious to modify Underwood et al. and select an LDPE film of at least 20 N/ply, since Underwood et al. teach a tape suitable for cleanly tearing an LDPE film, with the intention that the LDPE can be used for enclosing commercial goods and Osborn teaches conventional LDPE films used to enclosed commercial goods have a PPT value of at least 20 N/ply. Thus, one would have been substituting one LDPE film for another for the same purpose: enclosing commercial goods.

Leseman et al also teaches tear reinforced tear tapes that are an improvement on oriented flat tapes, such as the one taught by Underwood et al., in that they provide very good cross-direction tear resistance, whereas conventional oriented flat tapes do not (column 2, lines 26-52, Column 5, line 60 to Column 6, line 13). Therefore, it would have been obvious to further modify Underwood et al. and select the reinforced tape of Leseman et al. since Leseman et al. also teach the reinforced tape is an improvement upon oriented or tensilized flat tapes because they are not nearly as susceptible to

Art Unit: 1761

cross-direction tears as oriented flat tapes, and thus would further enhance the "clean tear" purpose of the tape taught by Underwood et al.

Regarding claims 4,20, and 44, Underwood et al. teach LDPE is more flexible and more extensible than cellophane, which tears easily and leaves smooth edges, and consequently forms erratic wandering tear path (Column 1, lines 15-30). In other words, LDPE exhibits stretching before tearing.

Regarding claims 6,7,22,23 and 46, Underwood et al. teach the tape is suitable for opening packages made from polyethylene, LDPE, HDPE and other thermoplastic films., with the intention of the package containing a commercial item (Column 1, lines 10-34,Column 8, lines 43-49). Osborn teaches commercial packages made from LDPE have the conventional PPT of 48.9 N/ply or 97.9 N/ply. However, Underwood et al. are silent in teaching using multilayer films with a first layer of polyethylene and a second layer of polypropylene. However, to modify Underwood et al. and select any particular thermoplastic multilayer material would have been an obvious matter of design, *depending* on the particular PPT of the multilayer film selected since Underwood et al. teach a tape suitable for opening conventional polyethylene, or LDPE, films with the intended use in commercial packages and Osborn teaches conventional commercial LDPE-based packages are known to have a PPT of 48.9 N/ply or 97.9 N/ply. One would have been substituting one conventional commercially acceptable thermoplastic film for another.

Regarding claims 11 and 27, Underwood et al. teach forming the tape from a 2 inch roll (Examples in Column 5), and although silent in teaching any particular width

Art Unit: 1761

applied to the package, it would have been obvious to select a width of at least 8mm since Underwood et al. teach forming the tape from a 2 in. wide roll. Furthermore, to select any particular width less than 2 inches would have been an obvious matter of choice, depending on the desired tear size since the central portion of the tape is utilized to remove the film from the package.

Regarding claims 33 and 39, Underwood et al. teach replacing wrappers surrounding chewing gum packages with LDPE, but is silent in teaching not an edible item or food *per se*. However, once it was known to substitute LDPE wrappers with tearable tapes for cellophane wrappers for the conventional chewing gum package, to make such a substitution on a food package would have been an obvious matter of design choice depending on the type of outer wrapper desired since, as taught by Underwood et al., LDPE wrappers are more flexible and more difficult to shear (Column 1, lines 10-34) and one of ordinary skill in the art would recognize the packaging requirements of chewing gum would be shared with edible candies.

Claims 9, 25, and 56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Underwood et al. (US 3179326) in view of Osborn (US 4397703) and Leseman et al. (US 5080957), as applied to claims 1,2,4-8,11,13,14, 17,18,20,21-24, 27, 29,30,33,35-39, 41,42,44- 48,51,52 above, further in view of Hodson et al. (US 6316036 B1).

Regarding claims 9 and 25, although Underwood et al. teach utilizing an outer film in combination with a commercial product such as chewing gum and a tear tape

Art Unit: 1761

attached to the interior surface of the film. Underwood et al. are silent in teaching including indicia such that the tape does not obstruct the indicia. Examiner takes official notice that it was notoriously well known to incorporate indicia throughout the entire interior surface or exterior surface, or any surface in between, of a film enclosing a commercial package, such as chewing gum, to communicate product information or packaging information to the consumer. Hodson et al. are relied on as evidence of the conventional commercial package utilizing an interiorly attached tear tape that comprises an ink/print layer throughout an internal the entire film, and thus indicia would be opposite, but not obstructed by the tear tape attached to the interior surface (Column 2, line 57 to column 3, line 28). Therefore, to include such indicia on the film of enclosing the chewing gum package of Underwood et al. above the tape applied to the interior surface such that the tape not obstruct the view of such indicia from the exterior surface, would have been an obvious matter of design choice, since it was notoriously well known in the art to include to include an indicia on a commercial product package to communicate product information or packaging information to the consumer and it was known to include an entire internal indicia layer within the film such that a tear tape attached on the interior surface of the film would not obstruct the indicia. One would have been substituting one conventional commercial package film for another.

Regarding claim 56, Underwood et al. teach using tear resistant polyethylene films for enclosing chewing gum packages with an interiorly attached tear tape to access the gum, but are silent in teaching a food product in direct contact with the film. Hodson et al. also teach a commercial package utilizing tear resistant polyethylene films

Art Unit: 1761

an interiorly attached tear tape, but the package comprises a food product (e.g. cheese) in contact with the film (Column 2, lines 45-56 and Column 3, line 1-48 in light of the Figures). Therefore, it would have been obvious to modify Underwood et al. and include a food product in direct contact with the film since Hodson et al. teach polyethylene films with an interiorly attached tear tape is also suitable for direct contact with food. One would have been substituting one conventional consumer good for another in polyethylene film.

Claims 15,16, 31,32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Underwood et al. (US 3179326) in view of Osborn (US 4397703) and Leseman et al. (US 5080957), as applied to claims 1,2,4-8,11,13,14, 17,18,20,21-24, 27, 29,30,33,35-39, 41,42,44- 48,51,52 above, further in view of Kim (US 5203634).

Regarding claims 15,16, 31, and 32, Underwood et al. teach applying the tape having a removable central portion to either the inner or outer surface of the film (e.g. Figures 2 and 5) However, Underwood et al. are silent in teaching a tearable strip that is internally tearable mounted on *both* the exterior and interior of the film or that the tape has a cover tape on a surface opposite the tape. Kim also teaches flexible containers using tapes with pull tabs and removable central portions to tear an opening in the container. Kim is relied on as evidence of the conventionality of internally tearable portion and guides on both the interior and exterior of a given container wall, wherein one of the many advantages is the enhancement of tear opening feature (See Column 2, lines 19-25, Column 8, lines 11-27, Column 8, lines 60-65, Figures 8,19 and 20). It

Art Unit: 1761

also follows that the exterior tape would be a cover tape on the surface opposite the interior tape. Therefore, it would have been obvious to modify Underwood et al. and combine both embodiments taught by Underwood et al. such that the package had both an internal and external tape, and thus a cover tape on the surface opposite the internal tape, wherein the central portions are removed together since Kim teaches this combinations would lead to an enhancement of the tear opening feature. One would have been substituting one type of tape arrangement (i.e. single sided) for another for the same purpose: forming a tear opening in a flexible package using a tearable tape.

Claims 49 and 50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Underwood et al. (US 3179326) in view of Osborn (US 4397703) and Leseman et al. (US 5080957), as applied to claims 1,2,4-8,11,13,14, 17,18,20,21-24, 27, 29,30,33,35-39, 41,42,44- 48,51,52 above, further in view of Zurawski et al. (US 5885630).

Underwood et al. teach using polyethylene films, such as LDPE, for enclosing chewing gum packages, but are silent in teaching any shrink-wrapping or skin packaging. Zurawski et al. teach examples of conventional forms polyethylene wrappings for gum packages include skin packaging (e.g. blisters packs) and shrink wrap (Column 3, lines 1-25). Therefore it would have been obvious to modify Underwood et al. and utilize the polyethylene wrappers in any conventional form known to be associated with commercial gum package wrappers, such as shrink wrapped or

Art Unit: 1761

skin packaging, since one would have been substituting one conventional gum package wrapper form for another.

(10) Response to Argument

I. Claims 1,17, and 38 (and various claims depending therefrom) under 35 U.S.C. 103(a) as being unpatentable over Riddell (US 4773541) in view of Osborn (US 4397703).

With respect to the interpretation of Riddell by one of ordinary skill in the art, the Appellant contends that Riddell in teaching replacing boxes, teaches away from pliable materials, and is limited to materials "to make boxes" (i.e. "Simply put, one skilled in the art would not look to bag materials to make boxes" stated on Page 7, lines, 18-19). The Examiner agrees that Riddell is directed to replacing boxes (Column 1, lines 5-16). However, the Examiner fails to find support for Appellants assertion that Riddell teaches away from pliable materials and that the purpose of Riddell is to "make boxes". On the contrary, Riddell teaches "Suitable packaging materials include paper, polyethylene, films, oriented polypropylene films, etc. " (Column 2, lines 15-17), and , in describing the formation of the "trays" of the package (i.e. resulting from the removal of the tearable tape strips), Riddell further teaches "[b]ecause of the flexibility of the kraft paper, the guide tape remaining on the upper edge of each tray provides the structural reinforcement as well as the clean edge for display purposes." (Column 3, line 49 to Column 4, line 3). Riddell further suggests pliable materials, as opposed to "boxing

Art Unit: 1761

materials”, by teaching “ [t]he package comprises a single sheet of kraft paper which has been wrapped around the product” by conventional “Bundling or wrapping” apparatuses and methods (Column 2, lines 48-54). Wrapping and bundling methods would suggest pliable material is used, not the non-pliable material used to make boxes. Thus, one of ordinary skill in the art would not be discouraged from selecting pliable materials and would not conclude that Riddell is directed to making boxes because (1) Riddell teaches polyethylene films are “suitable packaging materials”, (2) Riddell teaches that the pliable material require reinforcement from the remaining guide tape to provide a tray-type structure after the tape strips are removed , and (3) Riddell teaches the package is formed by “wrapping”. Riddell, simply put, does not make boxes.

With respect to the actual combination of Riddell and Osborn, Appellant argues that one of ordinary skill in art would not understand Riddell to be compatible with films of the proper type, thickness and processing to be considered “tear resistant” as recited or that the bag materials of Osborn would provide sufficient stiff shipping and display characteristics desired by Riddell. Appellant concludes that, contrary to the Examiner’s assertion, substituting the film of Riddell with the film of Osborn is not merely substituting one type of polyethylene film for another for the same purpose. As discussed above, Riddell, taken as a whole, teaches polyethylene films would provide sufficient stiff shipping and display characteristics. Riddell does not teach the particular tear resistance of the films. In selecting a particular polyethylene film, one of ordinary skill in the art would recognize the polyethylene film taught by Riddell should provide sufficient stiff shipping characteristics and durability. Osborn teaches conventional

Art Unit: 1761

commercial bags made from polyethylene films that are used in shipping (Column 1, lines 1-25). Osborn teaches in particular, 6 mil LDPE and 9 mil LDPE are used for commercial bags and have a PPT of 48.9 N/ply and 97.9 N/ply (i.e. 11 and 22 lbf), respectively (Columns 19 and 20, Example 7 and Table 2). By teaching commercial bags used for shipping products, Osborn teaches the material from which the bags are made (6mil or 9mil LDPE with a PPT of greater than 20 N/ply) provide sufficiently stiff and durable characteristics, otherwise the material would not be suitable for shipping mercantile products. Although Riddell does not teach the particular type or thickness of polyethylene films, there would be a reasonable expectation of success in the combination of Riddell with Osborn, since Osborn teaches particular types of polyethylene films having a particular thickness and tear resistance (e.g. 6mil LDPE and 9mil LDPE, having a tear resistance of more than 20 N/ply) that are conventionally used for mercantile packages and provide a suitable strength for shipping and durability. As set forth in the Office Action, this is not merely substituting one type of polyethylene film for another for the same purpose, but Osborn provides motivation for teaching the particular polyethylene films of greater than 20 N/ply since these have been established in the art as durable and strong enough for shipping, as required for the polyethylene films of Riddell.

Appellant repeatedly emphasizes that one of ordinary skill in the art would not substitute a bag material Osborn for the packaging material of Riddell. However, Osborn teaches film having a tear resistance that provides strength and durability to withstand commercial shipping and handling, albeit in the form of a commercial bag.

One of ordinary skill in the art would recognize that the tear resistance depends on the film characteristics, and not the particular form/shape of the film (e.g. a bag or a wrapper). Therefore, there is a reasonable expectation of success that a wrapper made from the same film as Osborn would exhibit the same strength and durability to withstand commercial shipping and handling, since the tear resistance of the film affects package strength and durability.

Appellant further asserts that even if one could combine Riddell and Osborn, the combination does not satisfy the limitation of a tearable tape strip configured to controllably tear an opening through the film with a tear resistance of 20 N/ply. Appellant supports this assertion, by stating that Riddell is directed solely to kraft paper. Riddell teaches polyethylene films that provide the necessary shipping and display stiffness and durability for a mercantile package, and Riddell teaches the tape is configured to controllably tear an opening through the film for accessing the enclosed region upon tearing of the tearable tape strip (Column 2, lines 13-17 and Column 1 lines 19-53). Osborn teaches conventional polyethylene films that are used to provide sufficient shipping stiffness and durability for mercantile packages, such as commercial bags, have a tear resistances greater than 20 N/ply. Thus, there is a reasonable expectation of success that in selecting the film of Osborn the tape would be capable of providing an opening, since Riddell teaches polyethylene films that provide shipping stiffness and durability for mercantile packages can be opened by the tape and Osborn teaches conventional polyethylene films used in the art that provide shipping stiffness and durability for mercantile packages.

II. Claims 1,17, and 38 (and various claims depending therefrom) under 35 U.S.C. 103(a) as being unpatentable over Underwood et al. (US 3179326) in view of Osborn (US 4397703) and Leseman et al. (US 5080957).

Appellant contend that combining Underwood et al. and Osborn is an oversimplification of the references, and that one seeking to select heat sealable materials for tightly wrapping an article (i.e. Underwood et al.) would not look to tarps or sacks (Osborn) nor would they expect tear tapes for one material to function with the other. Appellant further argues that Underwood et al. is directed to packaging *similar* to cellophane for cigarette packs , Osborn teaches a sack that has to endure dropping from heights greater than 5 feet, and Osborn's film must serve in more demanding applications than Underwood to provide motivation to combine. However, it is first noted that Underwood et al. teach tear tapes that controllably tear LDPE films, in particular, but are also compatible with a large number of films, such as cellophane (Note Column 8, lines 43-51). Underwood et al. does not limit the use of the tear tapes to gum or cigarette packaging. Underwood et al. teach conventional tear tapes have worked well for gum and cigar because those packages have used readily tearable cellophane wrappers , and Underwood et al. teach a new type of tear tape that offers the advantage of being capable of tearing more difficult to tear films, and specifically LDPE in a wrapper form(Column 1, lines 15-33). Underwood et al. teach the wrappers are for packaging commercial goods, and Osborn teaches LDPE films suitable for packaging commercial goods at a thickness of 6mil and 9 mil have a tear resistance of

Art Unit: 1761

48.9 N/ply and 97.9 N/ply , respectively. One of ordinary skill in the art would recognize commercial goods comprising film-based packaging require films of a particular thickness and resistance to tear to endure similar shipping and handling abuses, and that Osborn does not teach away from Underwood et al. because Osborn utilizes a film as a bag as opposed to a wrapper. One of ordinary skill in the art would recognize that a tear resistance of *bag* made from 6 mil LDPE that is suitable for mercantile packaging would exhibit the same as the tear resistance of a *wrapper* of 6mil LDPE. One of ordinary skill in the art would further recognize that a LDPE film with a thickness of 6 mil, for example, would not be strictly limited to forming bags, and that this thickness would be suitable as wrapper . Thus, there is a reasonable expectation of success in selecting the LDPE film of Osborn for the wrapper of Underwood et al. because Underwood et al. a LDPE wrapper for packaging commercial goods and Osborn teaches LDPE films that are suitable for use as package commercial goods have a tear resistance of greater than 20 N/ply.

With respect to Leseman et al., Appellant has argued that the Examiner has improperly relied upon Leseman et al. in order to incorporate fiber reinforced tear tapes into Underwood et al. because Underwood et al. do not describe any greater need for improving the tear resistance and Underwood et al. already teach very good cross direction tear resistance. However, Leseman et al. do teach a need for improving the oriented flat tapes in that they provide very good cross-direction tear resistance, whereas conventional oriented flat tapes do not (column 2, lines 26-52, Column 5, line 60 to Column 6, line 13). Although, no particular value is given to compare the “very

Art Unit: 1761


good" cross-directional tear resistance in either reference, Leseman et al. teach that fiber reinforced tear tapes are better than oriented flat tear tapes. Therefore, Leseman et al. provides motivation for substituting fiber reinforced tear tapes for oriented flat tear tapes by suggesting that there is an advantage to making such a substitution and provides a reasonable expectation of success.

(11) Related Proceeding(s) Appendix

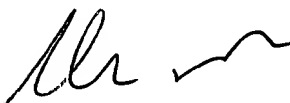
No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

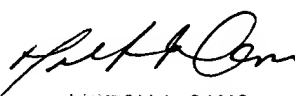
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April 11, 2005

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